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No. 86-1097

In The Supreme Court

OF THE

United States

October Term, 1986

APOLLO OF THE OZARKS, INC.,
AND RED ROCKET FIREWORKS,
Petitioners,

v.

SPIRO GIOTIS AND MALCOLM GILLESPIE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

May a manufacturer or primary distributor of fireworks be subjected to jurisdiction in Wisconsin, consistent with the due process clause, where that party advertised and sold to customers on the interstate highway system and also knowingly sold to a distributor of fireworks, which directly served the Wisconsin market for sale of its fireworks, the place at which a firework was eventually set-off and caused injury?

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STATEMENT OF THE CASE

Petitioners' statement of the case fails to point out the following. Apollo of the Ozarks, Inc. (Apollo) mainly sold to big wholesalers who in turn sold to others. Petitioners' Appendix at A-3. Red Rocket Fireworks (Red Rocket) sold primarily (85-90% of its sales) to distributors. Petitioners' Appendix at A-3. Red Rocket at one point admitted that the distributors to whom it sold have the capability of distributing the fireworks to any number of states. Petitioners' Appendix at A-13. Apollo and Red Rocket also advertised along their retail outlets along interstate highways. Petitioners' Appendix at A-3.

There is no evidence that Apollo or Red Rocket were unaware of the scope of Capitol Fireworks Company's (Capitol) sales efforts. Petitioners' Appendix at A-13. There is no evidence that Apollo or Red Rocket relied on Capitol's advertisements in American Riflemen which stated it would not sell fireworks where prohibited by law. Petitioners' Appendix at A-14, A-15.

With the above facts, Gillespie accepts for purposes of this petition the petitioners' Statement Of The Case.

REASONS FOR DENYING WRIT

A writ of certiorari should not be granted. The Seventh Circuit's decision does not conflict with a decision of this court, and the issue decided by the Seventh Circuit is in accord with other circuits.

1. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH WORLD-WIDE VOLKSWAGEN.

Apollo and Red Rocket attack the Seventh Circuit's decision as conflicting with the "purposeful availment" requirement of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Petition at 10-11. Apollo and Red Rocket conclude that since they individually have not "advertised or engaged in any other type of business activity in Wisconsin"

the purposeful availment test has not been met. Petition at 13-14. They mischaracterize the Seventh Circuit's decision as "holding any manufacturer subject to suit in any state where its product causes injury." Petition at 15.

As Apollo and Red Rocket correctly point out, World-Wide Volkswagen requires the defendant corporation to purposefully avail itself of doing business in the forum state. Petition at 10; 444 U.S. at 297. The defendant's contacts with the forum state must be assessed to determine if that defendant should have reasonably anticipated being subjected to suit in the forum State. Id.

Apollo and Red Rocket attempt to characterize their contacts as being

the same as the regional distributor and retail dealer in World-Wide Volkswagen who limited the market served to New York, New Jersey and Connecticut. Petition at 14. In World-Wide Volkswagen, this court found that the regional distributor and retail dealer did not purposefully avail themselves of doing business in Oklahoma.

Apollo and Red Rocket however later admit a distinction between themselves and the defendants in World-Wide Volkswagen. Petition at 15. This distinction is fatal to their argument as is readily apparent from a review of the facts.

Apollo and Red Rocket sold to Capitol, a retail distributor which advertised nationwide in the American

Rifleman magazine. Capitol's advertising was calculated to reach buyers in distant forums such as Wisconsin. Petitioners' Appendix at A-13. The Seventh Circuit found Capitol purposefully directed its sales efforts to Wisconsin. Petitioners' Appendix at A-13, A-14. Apollo and Red Rocket do not disagree with this finding.

It is undisputed that Apollo and Red Rocket are primary distributors who knowingly sold to Capitol. Petitioners' Appendix at A-13. As primary distributors upstream from Capitol in the distribution system, the Seventh Circuit held Apollo and Red Rocket to the same expected scope of distribution as Capitol. Petitioners' Appendix at A-13, A-14.

Contrary to the assertions of Apollo and Red Rocket, the holdings of this court do not require that the head of the distribution system serve directly the market of or itself have physical ties with the forum State. World-Wide Volkswagen, 444 U.S. at 295 (efforts to indirectly serve the market of the forum State through others for its products are sufficient); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985) (no physical ties are necessary). It is sufficient that Apollo and Red Rocket were the head of a distribution system which advertised in and directed its sales efforts to a broad market which included Wisconsin. The Seventh Circuit merely held that a manufacturer is subjected to suit in any state its product causes injury and

which was within the expected scope of distribution. This is exactly what this court ruled in World-Wide Volkswagen. 449 U.S. at 298-99.

2. THE RATIONALES OF THE SEVENTH CIRCUIT DO NOT CONFLICT WITH DECISIONS OF THIS COURT.

Apollo and Red Rocket cite two rationales which supposedly conflict with World-Wide Volkswagen. First, they argue that World-Wide Volkswagen requires a direct "economic benefit earned by the sale of goods that are eventually used in Wisconsin." Petition at 18-19. Second, they argue the Seventh Circuit did not determine their amenability to jurisdiction based upon their actions and expectations but upon some other person. Petition at 20.

Apollo and Red Rocket base their first argument on the following language from World-Wide Volkswagen:

> . . . financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. 444 U.S. at 299.

Petition at 19.

Apollo and Red Rocket do not have a "collateral relation" to Wisconsin as referred to in World-Wide Volkswagen. The financial benefits to the regional distributor and retail dealer as cited in World-Wide Volkswagen were the ability to use the product in Oklahoma and have the product serviced there. 444 U.S. at 298. This court held:

> . . . whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of in personam jurisdiction over them.

444 U.S. at 299.

Here, Apollo and Red Rocket derive direct economic benefits from being at the head of an interstate distribution system and purposefully selling to other distributors such as Capitol which sought to serve the Wisconsin market among other states for its sales. Apollo and Red Rocket cannot deny that they had benefitted from Capitol's efforts to serve a broad interstate market which included Wisconsin.

> [W]here individuals "purposefully derive benefit"

> from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

Burger King Corp., 471 U.S. at 473-74.

The benefits indirectly received from Wisconsin through Capitol's sales efforts does not constitute a collateral relation to Wisconsin, but an effort to indirectly serve a broad market which included Wisconsin.

> [A] corporation "purposely avails itself of conducting business within the forum State." . . . if it indirectly [serves] the market for its product in [the forum State]. (Emphasis supplied.)

World-Wide Volkswagen, 444 U.S. at 297.

Apollo and Red Rocket's second argument that the Seventh Circuit did not consider their individual actions and expectations again misses the mark. Petitioners' Appendix at 19-20. Apparently, they assert they had no reasonable expectation their products would be consumed in Wisconsin which would put them on notice of their amenability to suit there. Burger King Corp., 471 U.S. at 472; World-Wide Volkswagen, 444 U.S. at 297; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984). Presumably, if Apollo and Red Rocket had reasonable expectations of being hailed into Wisconsin, they could have acted "to alleviate the risk of burdensome litigation by insurance, passing the expected costs on to customers, or, if the risks [where] too

great, severing [their] connection with [Wisconsin]." World-Wide Volkswagen, 444 U.S. at 297.

Apollo and Red Rocket's actions show they did nothing to alleviate the risk of burdensome litigation but increased it. They advertised along interstate highways in an effort to sell their fireworks to residents of any state passing through. Petitioners' Appendix at A-3. They sold their fireworks primarily to other distributors who sold the fireworks to a national market, including Wisconsin.

Apollo and Red Rocket's professed lack of actual knowledge of the distribution system does not insulate them from defending actions in forums included in the national market of the

distribution system. They cannot blindly put their products into the stream of commerce and then wield the due process clause as a territorial shield to avoid obligations which they have voluntarily assumed by selling their products to national distributors. Burger King Corp., supra at 10-11.

3. THERE IS NO CONFLICT WITHIN THE CIRCUITS.

Apollo and Red Rocket conclude that the circuits "have clearly had difficulty applying World-Wide Volkswagen to manufacturers and primary distributors." Petition at 28. Apollo and Red Rocket do not cite any cases in which the holdings conflict. Rather, they attempt to manufacture a conflict by arguing that the analyses conflict.

The "conflicting analyses" are easily reconciled, leaving their conclusion without a basis.

Apollo and Red Rocket argue one line of cases focuses on the manufacturer or primary distributor's knowledge while the other line of cases focuses on the economic benefits to the manufacturer or primary distributor. Petition at 23-24. These two analyses are part of the courts' determinations of the expected scope of distribution system below the seller as required by World-Wide Volkswagen. 444 U.S. at 297-98; Petition at 22.

This requirement is derived from the "foreseeability that is critical to the due process analysis." World-Wide Volkswagen, 444 U.S. at 297. Foreseeability is measured by whether

the manufacturer or distributor "should reasonably anticipate being hailed into court there." Id. This court has found that the defendant should reasonably anticipate being hailed into the forum State if it indirectly serves the forum State's market.

> . . . if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id.

Efforts to serve, directly or indirectly, the forum State's market are measured by economic benefits

received. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) ("[the activities of the distributor] resulted in a large volume of interstate business. . . ."); Keeton v. Hustler Magazine, Inc., 465 U.S. at 781 ("where . . . respondent . . . has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being hailed into court there. . . ."); Burger King Corp., 471 U.S. at 473 ("Moreover, where individuals 'purposefully derive benefit' from their interstate activities. . . .").

This court has also found the defendant should reasonably anticipate being hailed into the forum State if it had actual knowledge of its connection with the forum State. Calder v. Jones,

465 U.S. 783, 789-90 (1984) ("And [petitioners] knew that the brunt of that injury would be felt by respondent in the [forum] State. . . .").

Contrary to Apollo and Red Rocket's position, this court has consistently "rejected the notion that personal jurisdiction might turn on 'mechanical' tests. . . ." Burger King Corp., 471 U.S. at 478, citing International Shoe, 326 U.S. at 319. Rather, each defendant's contacts with the forum State must be assessed individually. Calder, 465 U.S. at 790.

In the cases cited by Apollo and Red Rocket, the courts are individually assessing the contacts of each case and not applying a rigid or mechanical rule. Oswald v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980) (the

court found the distributor knew distribution chain and "made efforts to serve indirectly the market for its product in Texas."); Noel v. S.S. Kressge Co., 669 F.2d 1150, 1155 (6th Cir. 1982) (while the court found the distributor was "familiar" with the distribution system, it also found that the distributor "at least indirectly sought to serve the market for its products in [the forum State]."); Plant Food Coop v. Wolfkill Feed & Fertilizer, 633 F.2d 155, 159 (9th Cir. 1980) ("This contact with [the forum State] was voluntary and financially beneficial to [the distributor]." (Emphasis added.)).

Consequently, there is no conflict as suggested by Apollo and Red Rocket but merely the assessment individually

of the contacts of each case to find whether the defendants should have "reasonably anticipate[d] being hailed into court there." World-Wide Volkswagen, 444 U.S. at 297. Certainly this court is not going to require a determination of the seller's reasonable expectation to rely solely on the seller's professed actual knowledge.

4. APOLLO AND RED ROCKET OVERSTATE THE IMPACT OF THE SEVENTH CIRCUIT'S DECISION.

Apollo and Red Rocket argue that the Seventh Circuit's decision abolishes due process restrictions, effectively preventing manufacturers and distributors from limiting their exposure. Petition at 28-29. This is wholly unfounded.

Manufacturers and distributors limiting their sales to users within identifiable territories will not be affected. If Apollo and Red Rocket only sold to the end users who were Missouri residents from their stores in Missouri, there is nothing in the Seventh Circuit's decision to suggest they would have been amenable to suit in Wisconsin. Or, if Apollo and Red Rocket had sold to distributors and relied on the distributors' limited sales territory, restricted to a number of states which excluded Wisconsin, they would not have been amenable to suit in Wisconsin.

But here Apollo and Red Rocket injected their products into the stream of commerce to interstate transients and distributors seeking to serve the

market in every state. The Seventh Circuit correctly held Apollo and Red Rocket to the scope of the sales efforts of Capitol which was below them on the distribution scheme. Apollo and Red Rocket which made no effort to limit their exposure but blindly passed their products along cannot insulate themselves from their responsibility. They must account for their actions.

5. THIS CASE WOULD NOT COMPLIMENT ASAHI.

Apollo and Red Rocket argue this case would compliment this court's expected decision in Asahi Metal Industry Co. v. Superior Court, No. 85-693. They cite two insignificant factual differences as a bases for their assertion. First, Asahi involves a component manufacturer with no

control over the eventual distribution of its product, but admitting to having knowledge of the expected scope of distribution. The present case involves a manufacturer and distributor of a finished product, having no control or professed knowledge of the expected scope of distribution. Second, personal jurisdiction Asahi is based upon the place of sale for the defective product while here it is based upon the ultimate use being within the scope of sales efforts.

In World-Wide Volkswagen, this court discussed at length the purposeful availment as it related to foreseeability. Supra at 4. Knowledge of the manufacturer or distributor is only one possible way to fulfill the purposeful availment requirement. Supra at 17.

The second factual distinction is imaginary. Sale and use are not the determining factors. Given the professed lack of knowledge of Apollo and Red Rocket the critical factor is whether the manufacturer or distributor "directly or indirectly" sought to serve the market in the forum State. World-Wide Volkswagen, 444 U.S. at 297.

The factual distinctions will not lend to further development of law through comparison as cases of this court have addressed the distinctions. Supra at 16-17. They will simply show that minimum contacts are measured by the facts of each case, not an inflexible standard, and that this court determines minimum contacts based upon the totality of the circumstances. Supra at 18.

CONCLUSION

Gillespie requests that this court deny the writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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